

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF OHIO
3 WESTERN DIVISION

4 MIDLAND FUNDING, LLC., Case No. 3:08CV1434
5 Plaintiffs, Toledo, Ohio
6 April 6, 2011
7 10:00 a.m.

8 -vs-

9 ANDREA L. BRENT, et al.,
10 Defendants.

11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE DAVID A. KATZ
13 UNITED STATES DISTRICT JUDGE

14 APPEARANCES:

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P R O C E E D I N G S

THE COURT: I presume we have a court reporter?

THE CLERK: Yes, sir, we do.

THE COURT: I think everyone should identify themselves for the record, please. Since the movants will go first, I'd appreciate it if they would identify themselves for the court reporter.

MR. BENNETT: Your Honor, my name is Leonard Bennett. I'm at the podium here at the mike at our counsel desk. We don't have the ability to see Your Honor, but --

THE COURT: No great loss.

MR. BENNETT: Yes, sir. I'm here together with co-counsel with my law firm, Matthew Erausquin, who is in our Alexandria office, and Susan Rotkis in our Newport News office. We are in the Court, it is a classic wood panel courtroom. Your camera has myself and the local Midland counsel. You cannot see us in the camera, but we are off to what would be your, I guess, right, my left at our counsel table. But otherwise, it is a typical environment, I suspect, Your Honor.

THE COURT: Very good. And I presume there

1 are in Toledo a group of folks gathered?

2 MR. SEITZ: Yes, Your Honor. Ted Seitz
3 appearing on behalf of the defendants Midland Funding
4 and Midland Credit Management.

5 THE COURT: You will have to approach the
6 podium.

7 MR. SEITZ: I apologize, Your Honor. Ted
8 Seitz on behalf of Midland Credit Management and
9 Midland Funding. I am here with Donna Evans on behalf
10 of the plaintiffs. In addition, Mr. Jackson is also
11 here on behalf of Rubio and James, along with
12 Mr. Nightingale as well.

13 THE COURT: I hope the sound is coming
14 through better.

15 MS. EVANS: I don't think it is, Your Honor.

16 MR. SEITZ: We are getting feedback here.

17 THE COURT: Very good. All right. What is
18 the request of time allocation from the moving party?

19 MR. BENNETT: Your Honor, having grown up as
20 a lawyer in the Eastern District of Virginia, I suspect
21 that we would be comfortable with ten minutes.
22 Certainly Your Honor has had an opportunity to review
23 our pleading, but I don't believe that I would
24 necessarily need to restate all of those arguments.

25 THE COURT: All right. I assumed that I

1 would give you at least 20 minutes, of which you can
2 reserve a portion for rebuttal.

3 MR. BENNETT: Thank you, Judge. I would like
4 to reserve half of that for rebuttal.

5 THE COURT: Very good. Please proceed.

6 MR. BENNETT: Thank you, Your Honor. Judge,
7 we are here and you are there on behalf of two groups
8 of individuals. The first are two individuals that we
9 allege we represent that have opted out of the
10 litigation in Ohio. Those were Rubio and James, and
11 they present the argument that it is valid to opt out,
12 their opt-outs are legal.

13 And in fact, the law in the Sixth Circuit,
14 the law in this country is that the Court has
15 jurisdiction over consumers or over parties in a class,
16 class members who are not present in Ohio and who
17 otherwise have not been in contact in Ohio only upon
18 the failure to opt out. That is, it is sort of an
19 assumed consent to jurisdiction. If a plaintiff or
20 class member does not opt out, then they are presumed
21 to consent to jurisdiction, and the minimum contact
22 concerns, the process concerns are in part applicable.

23 And the law in this regard, Your Honor, is
24 not controversial, and I recognize that you have
25 disparate briefs but conflicting briefs. There is no

1 court that has ruled that you can have jurisdiction in
2 a money damages class action, that is, one under Rule
3 23(b)(3), without the minimal contact or the inferred
4 consent of the opt-out.

5 Certainly Miss Rubio and Mr. James, Mr. James
6 is an identity theft victim that wants to go to court
7 immediately to have this judgment he just discovered
8 vacated and renew his credit. Miss Rubio has been in
9 litigation long before Your Honor's case turned into a
10 national class in February, and both have exercised
11 their right to opt out.

12 As just a brief aside, Your Honor, we have
13 filed a declaration, an extraordinary filing that
14 normally would have been done based on -- and I
15 understand that these were not intended to disparage
16 us, but the accusation had been made in briefing by the
17 Plaintiff that we had manipulated the opt-outs. The
18 insinuation that was had mailed them, that we had
19 checked boxes and filled them out, which certainly is
20 false, and I have sworn not simply as an officer of the
21 Court but under penalty of perjury that that is not the
22 case.

23 Mr. James' opt-out has been attached. It was
24 mailed and he received the information that was
25 provided to Mr. Murray. They seek through proceedings

1 to recover their own financial lives, correct their
2 credit, go to court, and obtain relief.

3 We had briefed the issue at length in our
4 memo. At the Court's initial telephone conference, it
5 appeared to us that Your Honor's direction for that
6 issue was whether or not you could continue to pursue
7 claims after opting out or after the settlement in
8 general if you have opted out, that were otherwise to
9 be released, and the defendant has not argued that
10 position, nor do I think they can.

11 We briefed it -- an opt out, from the
12 litigation in the other venue. On behalf of -- the
13 defendant also makes the argument as to Rubio and
14 James, Your Honor, that you are not allowed to opt out
15 until the opt-out period closes. There is no law on
16 that to the contrary. The law is that you cannot
17 enjoin a class member [inaudible] because you cannot
18 presume that minimal contact is happening, so there is
19 nothing, there is no evidence, Your Honor, other than
20 the assertions of Midland that we would just rush in
21 for a settlement, Your Honor, as the opt-outs continue
22 to and seek to proceed.

23 And the only other instance in which we were
24 able to find a case in which an injunction was granted
25 during the required final approval of the closing and

1 opt-out is where there was evidence that it was
2 impossible for the parties in the litigation in the
3 settling venue to put together the settlement. They
4 didn't have the resources because there were, you know,
5 a large number of other cases that were going to trial
6 and litigation.

7 In this instance, Midland has a totally
8 separate defense team. They have not had any
9 interaction in this case prior to this process now with
10 the folks you are dealing with in Ohio.

11 The second, Judge, we also made the arguments
12 on behalf of objector in the motion to intervene. The
13 defendant has not contested that, Mr. Herring. The
14 tolling issue is significant, and we raised it. The
15 two biggest issues is, number one, we simply ask that
16 the injunction be modified so that claims are tolled to
17 the same degree that claims are enjoined, and the law
18 in your circuit, the law nationally, is the same. In
19 your circuit, *Wyser-Pratte*, a Sixth Circuit case was
20 cited, as well as Northern District of Ohio case *In Re*
21 *Vertrue Marketing*, both of which say, respectively,
22 first, that the party that is not in the, in the class
23 case, for example, the debt collectors here in
24 Virginia, the debt collectors in California or
25 Washington, they, you cannot enjoin those individual

1 defendants because they, you cannot toll claims against
2 them. They are not present in your court. You don't
3 have jurisdiction over them.

4 So, we seek to clarify that not just that,
5 that in those instances, because you are unable to
6 affect tolling as to those nonparties, the non Encore,
7 non Midland parties, that you allow us to clarify this
8 injunction, that it does not enjoin us and others from
9 pursuing those claims, and secondly, Judge, the law in
10 your district, the law nationally, the *In Re Vertrue*
11 *Marketing* case in the Northern District of Ohio says
12 that if a claim is not pled, it is not tolled. And in
13 this instance, the only claim we have pled is an
14 Ohio-based Fair Collection Debt Practices Act claim,
15 and there are a large number of other claims that are
16 not tolled and there is no pleading that alleged a
17 national class, and that, Your Honor, can cure, despite
18 Midland rejecting your offer and our offer of agreeing
19 to toll during the pendency of the settlement process.

20 We ask that Your Honor enforce that and amend
21 the injunction so that all the claims that have been
22 tolled -- or enjoined, rather, are also tolled, and I
23 would certainly be happy to answer any question Your
24 Honor may have.

25 THE COURT: Well, I do have a couple

1 questions. With respect to the opting out, it seems to
2 me that under Rule 20 -- God, I hear myself coming
3 back.

4 23(c)(2) and under *Newberg* that was written
5 on class actions, the notice must be mailed and
6 received by the person seeking to opt out before an
7 opt-out can be recognized as effective, and the reason
8 for that is because until receipt of the notice, the
9 individual does not have the ability to make a reasoned
10 judgment because the notice contains that upon which he
11 or she relies to be covered as part of the class, or to
12 opt out. Therefore, until the date of mailing, I
13 cannot see how under 23(c)(2) the opting out would be
14 effective.

15 MR. BENNETT: First, Your Honor,
16 respectfully, I strongly disagree, that the language of
17 23(c)(2) does not say this. It just simply says the
18 notice requires that you inform your consumer of the
19 opt out, and if you were to take this the other
20 direction and look at basic concepts of fairness, the
21 defendant has succeeded in enjoining our clients by
22 sending an email letter and copies of the settlement to
23 our clients by us as their counsel and has obtained the
24 benefit of an injunction that of course we have alleged
25 is not effective until the opt-out process is over, but

1 the defendant in this court has held otherwise in the
2 order that Your Honor signed.

3 The effect is that you would be permitting
4 notice to be made by counsel to counsel, but you would
5 require that our client sit there and stare at their
6 mailboxes.

7 Candidly, Judge, there would be significant
8 efforts made to explain to Your Honor why the mail
9 process itself is a very bad idea by a number of
10 objectors in separate matters, separate pleadings.

11 THE COURT: I beg your pardon? Would you
12 repeat that?

13 MR. BENNETT: Yes, Judge. We have not
14 substantively challenged the settlement in the current
15 motion. We are simply asking Your Honor to preserve
16 the status quo, that's what we are trying to do, while
17 the objectors have an opportunity to present to Your
18 Honor their arguments, their evidence, and the law with
19 respect to even whether the notice should go out.

20 For example, in the *Makson versus Portfolio*
21 *Recovery* case, Portfolio Recovery being one of
22 Midland's primary debt buyer rivals, that case settled
23 in our district here about two years ago and it also
24 dealt with the affidavits and pleadings that PRA was
25 filing with the Virginia state court, and the concern

1 that we had was that you would be sending out a notice
2 to consumers that debtors, that this defendant
3 currently in Virginia -- I don't know how it is outside
4 of Virginia -- is currently continuing all of its
5 garnishment and levying and debtor interrogatory
6 efforts collecting against these class members right
7 now as we speak, and you would be sending a notice to
8 them saying Midland is sending you notice, a court
9 notice so that you can fill out information and confirm
10 your identity and send it back for the possibility at
11 most of a ten dollar check.

12 It is a common practice of debt collectors to
13 send small checks to debtors so that they can get their
14 bank account information and their credit information,
15 their personal information. It is the most effective
16 skip trace in the world.

17 And so you will receive testimony from some
18 of the top debt collector defense experts who will
19 provide you the explanation or analysis that it is a
20 disaster to send notices out to these unrepresented, in
21 most instances, consumers that Midland will have full
22 access to at the same time they are continuing to try
23 to collect.

24 And so people make arguments; that is one of
25 a number of arguments that are shortly forthcoming from

1 the National Consumer Law Center, from the National
2 Association of Consumer Advocates, board members that
3 represent clients in a variety of contexts.

4 THE COURT: I'm obviously non plussed by that
5 argument because you did it. To the bottom of the
6 argument, you are saying class actions cannot be
7 effective. You cannot send out notices.

8 MR. BENNETT: No, sir.

9 THE COURT: If that's true, no class action
10 would be resolvable.

11 MR. BENNETT: For example, in the *Makson*
12 case, Judge, we included in our order a prohibition
13 such that the defendant debt collector would have no
14 access to any of the data. It would not know which
15 consumers were active, it would not know their current
16 addresses, and it could not use any of that information
17 for debt collection. And certainly we have settled,
18 and this is not as an objector, but in most
19 circumstances we are consumer class action counsel, and
20 so that --

21 THE COURT: Do you notice where these returns
22 are to go? They don't go to Midland, as I recall.

23 MR. BENNETT: It would go to a class
24 administrator that Midland has full access to, and that
25 is ordinary. In most circumstances, the defendant is

1 not adverse to the class members any longer. In this
2 instance it is different, because you have a debt
3 collector with judgments against the lion's share of
4 these folks, and is continuing to this moment, to this
5 day, to garnish and to levy and to file adversary
6 pleadings and collection pleadings against these class
7 members, and to suggest, Judge, getting back to the
8 question that it should be significant, even though it
9 is not in Rule 23 and there is no case law on this,
10 that it should be significant that our clients, by the
11 way, all of whom are represented, all of whom have
12 counsel, that you should facilitate a means by which
13 this debt collector should circumvent that, to be able
14 to have the direct contact with the represented
15 consumer debtors who have been sued in the past by
16 Midland, and force them to go through this exercise
17 twice is unjust.

18 The purpose of the process is to protect the
19 class member. That's the purpose. That's the only
20 purpose of the Rule 23 approval process, is to make
21 sure that as a fiduciary, in the interest of the class
22 members, that this settlement and the whole process
23 leading up to it is fair, and we represent individuals,
24 Judge, who have selected and asked us to represent
25 them. The opt-outs that have been sent through

1 Mr. Murray have been mailed by each class member. You
2 have my sworn testimony as to that --

3 THE COURT: I understand. Let me interrupt
4 you there.

5 Of those that I have seen, at the top of each
6 is the name with the same writing. The exact same
7 writing.

8 Additionally, some have both boxes, opting
9 in, opting out, remaining as checked, and one at least,
10 Morrow, has only the opt-in -- I use that, my own
11 term --

12 MR. BENNETT: Yes, sir. That certainly
13 confirms the process that I outlined in our
14 declaration, that we sent these, our clients, we sent
15 them a copy of the settlement agreement with the notice
16 and this form, with an instruction that they could
17 choose to opt out. Some have elected not to opt out,
18 and that is not unexpected.

19 THE COURT: But some have done both.

20 MR. BENNETT: And some have done both, and
21 certainly I think that there is legitimate concern
22 about the message that those who are checking those
23 boxes are conveying, but that is not Mr. James and that
24 is not the vast majority. It is one percent of all the
25 individual opt-outs, Your Honor.

1 THE COURT: Let's move on. I want to ask you
2 about tolling.

3 MR. BENNETT: Yes. sir.

4 THE COURT: I want you to comment on the
5 *Wyeth* case in the Eastern District Virginia last year,
6 *Torkie Tork v Wyeth*.

7 It would seem to me that that case permits
8 class action tolling because parallel state claims
9 would be tolled under Virginia law. I would then have
10 no occasion to seek whether particular Virginia claims
11 would be tolled under the present process, and I would
12 therefore have no need to amend the injunction
13 language.

14 MR. BENNETT: Judge, to the extent that --
15 well, first, *American Pipe* and *Crown Cork*, and Your
16 Honor, the Northern District of Ohio's decision in
17 *In Re Vertrue*, all say that this pertains to a unity of
18 parties and claims, and the rule -- and it is a
19 relation back under a Rule 15 analysis -- is that to
20 the extent that the defendant had notice of the, that
21 is, a future defendant, a defendant that sued in the
22 future. If the defendant had notice of the claim and
23 notice of the magnitude of the claim, then it is
24 tolled, and so there is a -- a pleading at some future
25 point that would file the action. Midland would say

1 your statute of limitations is expired, and we would
2 say, well, this claim was related to, it was a Virginia
3 conspiracy claim or an abuse of process claim under
4 State law and it was related to the Fair Debt
5 Collection Practices Act claim, and there is a couple
6 significant problems with that process.

7 Number one is it means there is uncertainty,
8 and in the future there is the possibility that our
9 claims are tolled, even for that subcategory.
10 Importantly, all of the tolling analysis assumes that
11 you have a unity of parties in the pleading, and
12 normally what is done, Your Honor, when a class action
13 settlement occurs, is you almost always have an amended
14 complaint that is filed that redefines the class, and
15 that is what would have been necessary and could still
16 be done, an amended complaint that changes the Ohio
17 Fair Debt Collection Practices Act to a national class.

18 Beyond that, you also have difficulty,
19 because there are claims that are not directly related,
20 but might -- that is, the defendant would argue that
21 they are not exactly the same, such as an abuse of
22 process claim or such as a civil conspiracy, or the
23 case of the identity theft victim and the credit
24 reporting issues that are still related in part, based
25 on the breadth of Your Honor's injunction to that, so

1 we are simply asking, and there has not been an
2 argument made by the other side, and Your Honor is
3 known for your fairness on all accounts, we are asking
4 for a fair outcome which simply doesn't prejudice
5 anybody.

6 It is, Your Honor, amend the injunction to
7 clarify that all claims by all national class members
8 with respect to Encore and Midland companies are
9 tolled, and there is no fair opposition to that.

10 And if it is true, as Your Honor suggests,
11 and as Midland or the plaintiff notes in simply a
12 footnote, that the state claims are tolled, then there
13 is no prejudice to anybody. I simply clarify the
14 order. We are not -- this is not an overreach at all,
15 Your Honor.

16 THE COURT: I understand now where you are
17 coming from.

18 MR. BENNETT: And Judge, it also doesn't
19 pertain, respectfully, regardless, you cannot toll
20 claims. You don't have the jurisdiction,
21 unfortunately, because that would be a simple fix.

22 You don't have the jurisdiction over
23 non Encore parties in both the Washington and
24 California cases, and in our other cases that would be
25 filed with Mr. James, we would bring action against the

1 debt collector bills in the State of Virginia that had
2 no connection to Encore Midland. You don't have
3 jurisdiction over those non parties at all. They are
4 not a family member of Encore, and so you don't have
5 the ability to toll. The way the injunction is
6 written, it certainly --

7 THE COURT: Why would you ever interpret the
8 injunction to reach non party defendants?

9 MR. BENNETT: The injunction says you cannot
10 file any action anywhere against anyone based on the
11 affidavits, and in fact, we think that Encore Midland
12 is violating its own injunction by continuing to
13 garnish and to levy class members during the pendency
14 of this injunction, but it is very wrong. And I
15 understand Your Honor did not draft it but it is Your
16 Honor's words, and we are asking now that you clarify.
17 Again, if that's the case, then there is no prejudice
18 or harm by simply confirming in an order that it does
19 not pertain to those non parties.

20 You have a similar confusion coming from the
21 Attorney General of Minnesota. I think that there will
22 be other Attorneys General that, as I understand,
23 will --

24 THE COURT: Are those criminal matters?

25 MR. BENNETT: The matter of the State

1 Attorney General in Minnesota is not at all a criminal
2 matter, Judge. It is as well a civil matter.

3 THE COURT: Thank you.

4 MR. BENNETT: Thank you, Judge.

5 THE COURT: Mr. Seitz.

6 MR. SEITZ: Thank you, Your Honor. Let me
7 move towards the podium here. I will be brief, Your
8 Honor, but I do want to remind the Court and maybe some
9 of the --

10 THE COURT: Before you start, I want to find
11 out if Judge Lauck is in the courtroom.

12 Can you hear me? I just want to say hello,
13 and thank you very much. (Inaudible.)

14 MR. SEITZ: Do you want me to go forward,
15 Your Honor?

16 THE COURT: Yes.

17 MR. SEITZ: Your Honor, I just wanted to
18 remind some of the parties in Virginia and other places
19 that what is really in front of the Court as far as the
20 cases, because I hear a lot of statements from Virginia
21 counsel about how --

22 THE COURT: If Mr. Seitz is speaking, I
23 cannot hear him.

24 THE CLERK: They have us muted on the bridge.
25 I sent an E-mail.

1 MR. BENNETT: It seems like the other site is
2 muted.

3 THE COURT: David, you might check and see if
4 your site is muted.

5 IT TECH: If it is muted, it is being done by
6 the bridge. The courtroom is not muted.

7 (Pause.)

8 THE CLERK: I think we reestablished. Looks
9 like we may be unmuted now.

10 MR. SEITZ: Your Honor, can you hear me?

11 THE COURT: Yes.

12 MR. SEITZ: It appears after this long
13 arduous case, Your Honor, I finally have been muted for
14 a while.

15 THE COURT: I can only hear every other word.

16 IT TECH: I have no answer.

17 MR. SEITZ: Do we want to take maybe five --

18 IT TECH: Talk slow, into the microphone.

19 MR. SEITZ: Your Honor, can you hear me now?

20 THE COURT: Yes.

21 MR. SEITZ: I will talk slow, and if I move
22 too fast, please remind me.

23 I just wanted to start off by reminding the
24 Court and the counsel in Virginia, they may not be
25 aware or sensitive to the fact, they mentioned in their

1 argument to start off that this was an Ohio-based
2 class, and while *Brent* was an Ohio-based class, as the
3 Court is aware, the *Vassalle* cases and the *Franklin*
4 cases have always been pled as national class actions,
5 and they are part of this settlement as well. The
6 other thing that I wanted to remind the parties about
7 is this is not only a (b)(3) settlement, this is also a
8 (b)(2) injunctive relief settlement as well.

9 So where I would like to start out is the
10 opt-out notice being effective, and clearly our view,
11 Your Honor, which I know is supported by law, is that
12 the opt-out that Miss Rubio and the other 55 people
13 have submitted is not effective, and in fact, Mr,
14 Bennett's own declaration supports why they are not
15 effective when he states that for those that are marked
16 both with, as you call it, Judge, the opt-in and the
17 opt-out boxes checked, even by his own admission there
18 would need to be some other follow-up or clarification
19 or affidavit from those people as to what they meant by
20 their notice.

21 This only underscores the importance of why
22 the notice process has to be followed in such a
23 rigorous manner, that it must be mailed out in a
24 neutral forum, then received by the class members, and
25 at that point they can go to counsel, other counsel,

1 and ask questions and ask advice on whether they should
2 opt in or opt out, or whether they should object to the
3 settlement, but until that time, until they receive it,
4 it is not effective, and this is in the cases that we
5 point out to the Court in our brief, and in addition, I
6 found another case which I did not have a chance to put
7 in our brief of which I know Mr. Bennett is familiar
8 with, and it is a case out of the Central District of
9 California called *White versus Experian Information*
10 *Solutions*, and the cite is 2009 Westlaw 4267843.

11 There have been a series of opinions in the
12 case, and the opinion I have is dated November 23,
13 2009. It talks about a situation where competing
14 counsel, a counsel that had objection to the
15 settlement, had sent out a competing notice, as the
16 Court called it, and tried to reach out to class
17 members, and the Court said, "The class members'
18 decision whether or not to opt out is a matter of
19 extreme importance, committed to the discretion of the
20 Court, not the litigants, and therefore a neutral
21 notice is sent to the parties. A party sending out its
22 own competing, argumentative notice and invitation to
23 the class members to opt out defeats the purpose of the
24 Court insuring that class members receive a neutral
25 notice."

1 In this case, as per Mr. Bennett's own
2 declaration that he submitted yesterday, he mentions in
3 Paragraph 14, "We began to counsel our clients they
4 needed to either opt out or object," and this is when
5 they sent out that proposed notice form that was a
6 preliminary approval order along with the other
7 documents that he says were submitted, and so in that
8 case, Judge, I would say this is actually a competing
9 notice. It is not neutral when he sends it out.

10 These people need to receive neutral notice
11 in the format that the Court has set forth in order for
12 any opt-out to ever be effective, so --

13 THE COURT: Excuse me. Excuse me. I don't
14 get double or triple pay for this torture, and I don't
15 mean what you are saying, but it is coming across
16 triple times. I have my right arm and my brain on this
17 matter.

18 Now, would you speak, and don't take this for
19 the record until I tell you. Do some speaking, would
20 you please, Ted?

21 (Discussion off the record.)

22 THE COURT: Back on the record.

23 MR. SEITZ: We'll try it again, Your Honor.

24 As I mentioned before, Judge, in this case,
25 the opt-outs that have been submitted, or alleged

1 opt-outs, are not effective. The Court needs to wait
2 and the class needs to wait for this notice to be
3 mailed out and then for valid opt-outs to be submitted.

4 And the other thing I wanted to mention, Your
5 Honor, which I think the Court has a clear view of, is
6 that if claims are tolled and you have the power to
7 toll it, pursuant to the *Torkie* case, which the Court
8 pointed out and which we also had attached to our
9 brief, in addition, I would like to note that under
10 Virginia law, Section 801-229(c), the statute of
11 limitations is tolled by an injunction. So while the
12 Court's injunction is effective in this case, claims
13 related to affidavits of the class members are tolled.
14 If the claims are not related to the affidavits, then
15 Your Honor, they are not tolled, and I want to make
16 sure that we're clear on that point.

17 If what Mr. Bennett suggested was to amend
18 the injunction so that any and all potential claims
19 against Midland are tolled while it is pending, I don't
20 think that is correct, Your Honor, especially if that
21 would include non class members. They can interpret
22 what that means.

23 So if it is related to an affidavit, the
24 claim is tolled. I think that that is clear. Once the
25 injunction is gone and the class settlement has been

1 approved and the opt-outs are effective, then those
2 people who have opted out as to those claims are free
3 to do so. Their claims have been tolled while the
4 class action, while the injunction was pending.

5 THE COURT: Let's go off the record for a
6 moment, please.

7 (Discussion off the record.)

8 MR. BENNETT: The Judge had another matter
9 she wanted to leave for. She wanted to express to Your
10 Honor her apologies. We confirm that we'll provide a
11 copy of the transcript to Judge Lauck.

12 THE COURT: And I will call her this
13 afternoon. Thank you.

14 Mr. Seitz, if you would continue. We're back
15 on the record.

16 MR. SEITZ: Yes, Your Honor. We have a
17 little bit of an echo here, but I think since the other
18 two locations are fine, we'll just bear it. I think we
19 can do so.

20 I guess with that, and what I said last time,
21 before we were cut off, maybe the best thing for me to
22 do is to ask if the Court has any questions or any
23 areas it wants me to address.

24 THE COURT: It seems to me that with this
25 problem and it being so difficult for me to hear, I'm

1 going to have to look at the transcript of this and go
2 from there.

3 With that in mind, I would like to suggest,
4 but not demand, that there be some post-hearing
5 briefing, very short, please, to the point, limited to
6 five pages on each side, unless counsel agrees with one
7 another that ten pages are appropriate.

8 All right. What I would like Mr. Bennett to
9 touch on are two issues in particular. One, any new
10 light to shed on the tolling issue. Two, requested or
11 suggested language in amending the injunction, and the
12 explanation of why you believe it is appropriate.

13 It would seem to me that Mr. Bennett would go
14 first, and Ted Seitz would respond. And Donna, if you
15 wish to speak, you may do so, and/or reserve for
16 briefs, whichever you wish.

17 MS. EVANS: Thank you, Your Honor. I just
18 have a few comments that I would like to make, and for
19 the record, I also wanted to let you know that counsel,
20 class counsel did receive the opt-out form from Gilbert
21 James in our mail Monday. It was postmarked on March
22 31st. So that form was not in our office at the time
23 the brief was filed.

24 Class counsel does respect the right of every
25 class member to opt out, if that is their choice. I

1 want to make that clear. And I think the issue at this
2 point comes down to when the opt-out is valid and when
3 it is timely, as the injunction stated. I believe that
4 that issue has been addressed completely, so I won't go
5 into that any further.

6 The other thing I wanted to bring out is it
7 seems to me that Mr. Bennett in his oral argument has
8 strayed from the request that he made in his motion.
9 He made two points, first having to do with the
10 opt-out, and second was this Court's jurisdiction to
11 enter the injunction in the first place.

12 As we stated in our briefs, this Court does
13 have the authority to issue an injunction against third
14 parties in aid of its jurisdiction, and I believe that
15 in this case, with the settlement pending, with the
16 fairness hearing going to be contested, as Mr. Bennett
17 states, he has already filed a motion for one of his --
18 one of the class members to intervene, and we do expect
19 that he is going to follow through on that, so we will
20 be opposing that motion.

21 However, as long as the fairness hearing is
22 going to be contested, this Court needs to retain
23 jurisdiction over those absent class members and the
24 opt-outs against any parallel litigation that could
25 produce conflicting results and could cause more

1 confusion for the class members, especially if the
2 litigation would be commenced prior to the actual
3 opt-out date.

4 At that point, I think those are the two
5 issues that I wanted to address with this Court, and I
6 will entertain any questions should you have any.

7 THE COURT: Thank you very much.

8 Mr. Bennett, you have the opportunity to
9 respond, briefly, as well as areas covered by briefing.

10 MR. BENNETT: Thank you, Judge. And I'll
11 keep it brief.

12 If I could, Your Honor, take the first
13 opportunity to try to elicit from Your Honor a flushing
14 out of the first issue, a new light on the tolling
15 issue.

16 I certainly want to brief, given the very
17 targeted sides, to be on point, and is there anything
18 Your Honor can suggest to inform us of the issue
19 that -- beyond the new light on the tolling issue that
20 you would suggest for that first point?

21 THE COURT: The only issue that I want you to
22 address is the response to Ted Seitz' assertions with
23 regard to that tolling issue, both in the Virginia
24 cases and elsewhere, the cases he cites. If you
25 believe you have already covered it, then I will reread

1 your previously-submitted memorandum.

2 MR. BENNETT: Yes, Judge. I don't believe
3 that we had addressed some of the arguments that were
4 made, and I will address them in the brief.

5 If I may, then, use my minutes to respond
6 briefly to the arguments that have been made.

7 THE COURT: Of course.

8 MR. BENNETT: Your Honor, it was our effort
9 with the targeted filings that were made not to try to
10 advance the position that the objections we made were
11 the substantive objections that I think Your Honor will
12 receive, may make. It was simply to ask for a
13 preservation of the status quo until Your Honor could
14 hear another side to the story, and you have not heard
15 any arguments at all as to what prejudice or harm would
16 befall either parties by the tolling.

17 In fact, with respect to the opt-outs, Judge,
18 the best way to moot the need to speed ahead with our
19 causes of action with respect to the opt-outs is to
20 make sure that their claims are fully protected, and
21 failing that, and to the extent that everybody agrees,
22 the parties, the opt-outs, the objectors all agree that
23 these claims should and would be tolled, that it should
24 not be a difficult exercise to reduce that.

25 We will propose an order hopefully this time

1 around that you will agree with, and I appreciate class
2 counsel's acknowledgement of the importance of the
3 right to opt out in accordance with law and class
4 action guidelines.

5 Your Honor, the other issue, briefly, there
6 is this case, *Wyeth versus Experian*, that was
7 discussed, and that was our \$51 million dollar
8 settlement in a consumer credit case in California, and
9 in fact the National Consumer Law Center is also part
10 of that.

11 In that instance, we defended as class
12 counsel to the Ninth Circuit. The objectors which were
13 part of our group that broke away, they wanted the
14 Court's blessing on a specific letter, and the Court
15 said you can send whatever letter you want, objector,
16 but you cannot get my blessing on it, and the last line
17 of the Court's order was just that. And the Ninth
18 Circuit recently sustained our defense of the Court's
19 order in concluding that nothing about the order
20 prohibited the communications by the objectors to their
21 clients, and that is a method of informing those
22 individuals and those class members who had all opted
23 out.

24 So, to the extent that *Wyeth v Experian* and
25 our case are similar, it strongly supports the position

1 we take, which is that there is not an inhibition to
2 the bar at all on advising your clients, those that we
3 represent as to the settlement, in providing the copies
4 of the documents.

5 So I appreciate, I know that Your Honor has
6 had a lot of patience. I thank you for setting this
7 up. I would remind Your Honor that Mr. James at least
8 has a statute of limitations that would expire
9 tomorrow, on the 7th, hence the urgency. And while I
10 will do my best to get our briefing out this evening or
11 first thing in the morning, that is a concern and --

12 THE COURT: I wanted to touch on that. I had
13 thought about that and I mentioned that as a reason for
14 rushing to set this hearing. But I, as much as I would
15 like to, can not rule by tomorrow. It would seem to me
16 that there would be a way to protect Mr. James.

17 I'm going to say this, and I don't mean it --
18 and not to offend the Court, I'm not talking about the
19 Judge -- not offend the injunction would be better
20 said, if you believe that it is necessary for you to
21 file by the end of the day tomorrow, it would seem to
22 me that I could say there is no penalty if you were
23 proven wrong. It is a difficult conundrum, I would
24 admit.

25 What say you, Mr. Seitz?

1 MR. SEITZ: Your Honor, we would be fine with
2 no penalty if Mr. James filed his claim by tomorrow.

3 THE COURT: Yes. I think that's a
4 resolution. I would like to suggest that if you feel
5 that you need to file, we will find other ways to
6 address the issue as we move down the road.

7 MR. BENNETT: Your Honor, may I suggest that
8 in that we currently represent 20 individuals who opted
9 out that have statutes of limitation expiring in the
10 month of April, what I would suggest is that we would
11 file, not serve, and immediately provide plaintiff's
12 counsel copies of that, in addition to our letter
13 confirming that we are not intending to serve, and that
14 would preserve the statute of limitations, as Your
15 Honor suggests, without disrupting Your Honor's
16 settlement, if Midland's concern is founded.

17 THE COURT: Well, the other course which we
18 take up in other matters like this is to make a
19 voluntarily extension of the statute of limitations as
20 between your firm and Midland as to the clients you
21 represent, and you and Mr. Seitz are encouraged to
22 explore that.

23 MR. BENNETT: Yes, Judge. The one additional
24 asterisk, the additional grace concern that the clients
25 we represent have is our read, if we take the broadest

1 read of the Court's injunction, which a lawyer with 16
2 years in Federal Court without a sanction, like myself,
3 you always take the broadest view, and we believe that
4 the broad reading of the injunction to bar our clients
5 from seeking to vacate their judgments in our state
6 collections court or even to defend against the
7 garnishments that Midland is engaged in
8 (unintelligible) then we would be fine. Your Honor's
9 suggestion would get certainly on the record the
10 Court's belief that the injunction doesn't reach the
11 vacations of judgments. I believe Your Honor's
12 suggestion is, would be effective.

13 THE COURT: Thank you. In the interest of
14 completeness, anyone else wish to make any statement at
15 this time before we discuss the timing of the briefing?

16 All right. It would seem to me that by
17 Monday next, Mr. Bennett, if you could file your
18 brief -- is that sufficient?

19 MR. BENNETT: It will be, Your Honor, yes.

20 THE COURT: And Donna and Ted, if you would
21 by the end of the week -- that is, a week from this
22 coming Friday, that will be the 15th, your response.

23 MR. SEITZ: That is fine, Your Honor.

24 MR. BENNETT: If Your Honor please, we
25 actually have due on Monday all of our response briefs

1 to the multiple Midland briefs, post trial briefs in
2 our Midland jury trial in Alabama. Those are due on
3 Monday. They will require my full time between now and
4 then.

5 THE COURT: What about -- the only issue is
6 the tolling issue that you have to brief. If we are
7 getting around that, why don't we say the 18th.

8 MR. BENNETT: Yes, sir.

9 THE COURT: That's a week from Monday.

10 MR. BENNETT: Yes, sir.

11 THE COURT: And Ted, the 25th.

12 MR. SEITZ: That is fine, Your Honor.

13 MS. EVANS: That is fine.

14 THE COURT: Is that all right, Donna?

15 MS. EVANS: Yes, Your Honor.

16 THE COURT: Okay. Anything else?

17 MR. BENNETT: Just to alert Your Honor, I'm
18 certain, I know that at least -- and we're not the one,
19 but you will have significant objection briefing and
20 subject matter jurisdiction being filed from the
21 Washington group, probably today or tomorrow. I expect
22 you will have similar substantive objections in terms
23 of court resources that would be coming in Your Honor,
24 in the same period.

25 THE COURT: Let me ask you, let's talk about

1 the length of the briefs. Most of us can't say hello
2 and good-bye in five pages.

3 MR. BENNETT: Yes, Judge.

4 THE COURT: What is your feeling, gentlemen
5 and lady, about the length?

6 MR. BENNETT: We will give as much as the
7 Court's resources will accommodate. If ten pages is
8 the larger of the two options, we ask for ten.

9 MR. SEITZ: Ten is fine, Your Honor. I think
10 we can do it in five. I'm from Michigan. They have a
11 five page limit for reply briefs. If Mr. Bennett wants
12 ten, that's fine, he can take ten; I'll take ten, too.

13 THE COURT: Well, max ten. Thank you very
14 much. I want to thank everybody for being available.
15 I want to thank you, those of the technical staff who
16 made this possible. Judge Lauck certainly. And we'll
17 move on from there.

18 MR. SEITZ: Thank you, Your Honor.

19 THE COURT: Thank you.

20 MS. EVANS: Thank you, Your Honor.

21 THE CLERK: Thank you, Judge.

22 - - - -

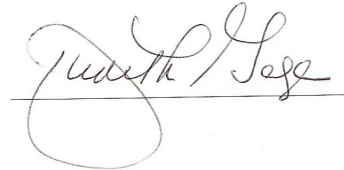
23 (Proceedings concluded at 11:21 a.m.)

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C E R T I F I C A T E

I, Judith A. Gage, Federal Official Court
Reporter, certify that the foregoing is a correct
transcript from the record of proceedings in the above
entitled matter.

A handwritten signature in cursive script, reading "Judith A. Gage", is written over a horizontal line.

April 14, 2011